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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. IAN MICHAEL DAWKINS, Appellant.	2 CA-CR 2007-0212 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20061680

Honorable Michel J. Cruikshank, Judge

AFFIRMED

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P E L A N D E R, Chief Judge.

¶1 After a jury trial, Ian Michael Dawkins was convicted of second-degree murder of his father. He was sentenced to a presumptive, sixteen-year term of imprisonment. On appeal, Dawkins challenges the sufficiency of the evidence to support the verdict, two jury instructions, the trial court's admission into evidence of his recorded statement to police and an undisclosed telephone call, the court's consideration of his "lack of remorse" at sentencing, and the constitutionality of A.R.S. § 13-501. We affirm.

Background

¶2 We view the evidence and all reasonable inferences in the light most favorable to upholding the jury's verdict. *State v. Miles*, 211 Ariz. 475, ¶ 2, 123 P.3d 669, 670 (App. 2005). Dawkins's mother married the victim, F., when Dawkins was almost two years old. Dawkins called F. "dad" throughout his life, and when Dawkins was ten years old, F. legally adopted him. When Dawkins started junior high school, he began to run away, sometimes for a day or two, and occasionally for up to a month. Dawkins's parents reported him to police each time he ran away from home.

¶3 In April 2006, when Dawkins was sixteen years old, he had an argument with his mother about his wanting to attend a party. When she arrived home on a Friday evening, Dawkins was not there or at work and did not answer his cellular telephone. She continued to call him the next day but decided to terminate his cell phone service when he failed to answer. Dawkins did not come home that weekend.

¶4 On Monday, Dawkins's parents learned that he had gone to school. F. went to the school in the afternoon and drove him home. Later that evening, Dawkins called a friend's girlfriend, Y., who came to pick him up. He told his parents he owed somebody money and had to go pay him back.

¶5 Dawkins eventually met up with Antoine King, and Y. drove them to Dawkins's parents' house. He and King entered the backyard while Y. stayed in the car and waited in an alley. A neighbor saw Dawkins and King try to unscrew or redirect the back porch light before Dawkins knocked on the back door. Dawkins's younger brother, who was thirteen years old at the time, let Dawkins inside the house. Dawkins told his brother to go to his room and lock the door, a request Dawkins had never made to him before. Dawkins also told his brother "somebody was coming" and "he didn't know what they were going to do."

¶6 From the master bathroom, Dawkins's mother heard F. talking to Dawkins in the master bedroom. Less than a minute later, she heard F. yell in surprise and then a gunshot. King had fatally shot F. in the chest. King returned to the car parked in the alley. Five to ten minutes later, Dawkins left the house, entered the car, and told Y. to drive away. After Y. dropped him off, Dawkins asked someone at a gas station for a ride back to his house, where police had arrived and were investigating.

¶7 Police took Dawkins to the police station and interviewed him. After giving several, varying accounts of what had happened, Dawkins admitted he had paid King to come

to his house merely to scare his parents and help him run away. He told police that once he was inside the house, he changed his mind. According to Dawkins, King became upset, hit him with the gun, and then shot F. Dawkins had a mark on his face, tending to corroborate that part of his story. Dawkins also said King had tried to shoot him and his mother, but when the gun jammed King had run out to the car instead.

¶8 The state charged both Dawkins and King with first-degree murder. Their trials were severed. At Dawkins's trial, the parties stipulated that King had fired the fatal shot. Dawkins did not testify, but the state played the digital video recording (DVD) of his interview with police. After a five-day trial, the jury acquitted Dawkins of first-degree murder but found him guilty of the lesser-included offense of second-degree murder.[1]

I. Sufficiency of the evidence

¶9 Dawkins first argues the evidence is insufficient to support his second-degree murder conviction. In addressing that claim, "we view the evidence in the light most favorable to sustaining the verdict and reverse only if no substantial evidence supports the conviction." *State v. Pena*, 209 Ariz. 503, ¶ 7, 104 P.3d 873, 875 (App. 2005). "Substantial evidence is more than a mere scintilla and is such proof that 'reasonable persons could accept as adequate and sufficient to support a conclusion of defendant's guilt beyond a reasonable

[1]In May 2007, King pled guilty to second-degree murder and was sentenced to a prison term of sixteen years.

doubt.'" *State v. Mathers*, 165 Ariz. 64, 67, 796 P.2d 866, 869 (1990), *quoting State v. Jones*, 125 Ariz. 417, 419, 610 P.2d 51, 53 (1980).

¶10 Evidence may be substantial, that is, sufficient to support a conviction, when it is strictly circumstantial. *State v. Blevins*, 128 Ariz. 64, 67, 623 P.2d 853, 856 (App. 1981); *see also State v. Spears*, 184 Ariz. 277, 290, 908 P.2d 1062, 1075 (1996); *Pena*, 209 Ariz. 503, ¶ 7, 104 P.3d at 875. And evidence must be considered substantial if reasonable minds can differ on inferences to be drawn therefrom. *State v. Davolt*, 207 Ariz. 191, ¶ 87, 84 P.2d 456, 477 (2004). "Reversible error based on insufficiency of the evidence occurs only where there is a complete absence of probative facts to support the conviction." *State v. Scott*, 113 Ariz. 423, 424-25, 555 P.2d 1117, 1118-19 (1976).

¶11 A person acting without premeditation commits second-degree murder in one of three ways: (1) "[t]he person intentionally causes the death of another person"; (2) "[k]nowing that the person's conduct will cause death or serious physical injury, the person causes the death of another person"; or (3) "[u]nder circumstances manifesting extreme indifference to human life, the person recklessly engages in conduct that creates a grave risk of death and thereby causes the death of another person." A.R.S. § 13-1104(A). Because the parties stipulated that King had fired the fatal shot, Dawkins's conviction apparently was based on accomplice liability.

¶12 Pursuant to A.R.S. § 13-303(A)(3), "[a] person is criminally accountable for the conduct of another if . . . [t]he person is an accomplice of such other person in the

commission of an offense." At the time of this offense, Arizona law defined an accomplice as one who,

> with the intent to promote or facilitate the commission of an offense:
>
> 1. Solicits or commands another person to commit the offense; or
>
> 2. Aids, counsels, agrees to aid or attempts to aid another person in planning or committing the offense.
>
> 3. Provides means or opportunity to another person to commit the offense.

A.R.S. § 13-301; *see also* 2008 Ariz. Sess. Laws, ch. 296, § 1; *State v. Phillips*, 202 Ariz. 427, ¶ 37, 46 P.3d 1048, 1057 (2002) (under § 13-303(A)(3), accomplice is criminally accountable for offenses he "intended to aid or aided another in planning or committing").

¶13 Dawkins contends that, because the jury acquitted him of first-degree murder, "[t]he evidence simply does not support a finding that [he] intended for his father to die or knew that Antoine would shoot or even point a gun at anyone." *See* § 13-1104(A)(1) and (2). In response, the state refers to the DVD played at trial of Dawkins's police interview, claiming there was abundant circumstantial evidence from which the jury could infer Dawkins had intended for King to kill his father or had known he would do so. Although Dawkins was not the shooter, the state argues, the evidence supported a finding of accomplice liability under § 13-303(A)(3). *See State v. Garnica*, 209 Ariz. 96, ¶ 30, 98 P.3d 207, 213 (App. 2004) (accomplice is criminally responsible if he intended "to promote the conduct of the principal"; accomplice liability for reckless offenses upheld when defendant supplied clip of ammunition to armed codefendant "who was in the middle of a shooting

spree"). The state also argues alternatively that the jury could have found Dawkins guilty under § 13-303(B).

¶14 We agree with the state that the evidence is sufficient to support Dawkins's second-degree murder conviction under § 13-303(B). In pertinent part, that subsection states:

> If causing a particular result is an element of an offense, a person who acts with the kind of culpability with respect to the result that is sufficient for the commission of the offense is guilty of that offense if:
>
> 1. The person solicits or commands another person to engage in the conduct causing such result; or
>
> 2. The person aids, counsels, agrees to aid or attempts to aid another person in planning or engaging in the conduct causing such result.

Thus, "when the underlying offense has as an element 'causing a particular result,' one may be liable as an accomplice [under § 13-303(B)] if he acts with a mental state 'sufficient for the commission of the offense'" and engages in any of the acts prescribed in subsection (B)(1) or (2). *State v. Nelson*, 214 Ariz. 196, ¶ 14, 150 P.3d 769, 771 (App. 2007), *quoting* § 13-303(B); *see also Garnica*, 209 Ariz. 96, ¶ 28, 98 P.3d at 213 ("as to a reckless offense, the [accomplice's] culpable mental state with regard to *the* offense at issue must be shown").

¶15 Because one of the elements of second-degree murder is "caus[ing] the death of another person," § 13-1104(A)(3), Dawkins could be found guilty if he acted recklessly, "[u]nder circumstances manifesting extreme indifference to human life," as long as the evidence also supported the findings required under either § 13-303(B)(1) or (B)(2). A

person acts with recklessness when he or she "is aware of and consciously disregards a substantial and unjustifiable risk that the result will occur." A.R.S. § 13-105(9)(c).

¶16 Although we agree with Dawkins that *Garnica* is clearly distinguishable on its facts, we disagree with his assertions that he could be found guilty as an accomplice to second-degree murder under § 13-303(B) only if he had "actively participat[ed] as an accomplice by facilitating [King's] discharge of the weapon" or had "promoted [King's] firing of the gun." *See Nelson*, 214 Ariz. 196, ¶¶ 15, 17, 150 P.3d at 771-72 (for crimes that qualify under § 13-303(B), "one may be liable as an accomplice if one commands or aids another 'in the conduct' that causes the required result," and "proof of intent to promote or facilitate the unintended result of the conduct" not required); *cf. State v. Rios*, 217 Ariz. 249, ¶ 10, 172 P.3d 844, 846 (App. 2007) ("One does not need to be present at the scene of a crime in order to be convicted as an accomplice: one can solicit another to commit the crime, provide the means to commit an offense, or command others to commit the crime" from elsewhere.). Notwithstanding any contrary suggestion in *Garnica*, 209 Ariz. 96, ¶ 23, 98 P.3d at 212, or *Nelson*, 214 Ariz. 196, ¶ 17, 150 P.3d at 772, we also disagree with Dawkins's contention that accomplice liability under § 13-303(B) "includes as a predicate § 13-301's requirement that . . . a defendant must have *intended* to promote or facilitate the conduct causing death and constituting the offense." Subsection (B) refers to neither the term "accomplice" nor § 13-301 in establishing a separate, independent basis for criminal liability.

¶17 The record reflects substantial evidence that Dawkins himself acted recklessly, exhibiting extreme indifference to human life, by bringing King to his house supposedly to "scare" his parents and help him run away without his parents reporting it to police.[2] Two days before, Dawkins and King had discussed King bringing a gun there with him. Although Dawkins later told police that he had not thought much about the gun or that it was real, he admitted he had seen the gun when King "came to the house." And, although Dawkins had met King just a few days before F. was killed, Dawkins told police he had "heard about" King, including his gang involvement and reputation for "[s]hooting and killing people and robbing" places.

¶18 Thus, Dawkins invited King to the house and let him in, knowing he was armed and, at least by reputation, dangerous. And the record supports a finding that Dawkins had known King was dangerous inasmuch as Dawkins had told his brother to go to his room and

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[2]During his closing argument, the prosecutor urged this alternate theory of liability by stating:

> [Dawkins] brought a stinking, gangbanging, gun-wielding, robbing thug into his home knowing this guy likes to shoot . . . . You know, you bring a gun-wielding animal into a house and show him to your parents after you told him what vile things your parents had done to you, it's pretty reasonable to expect he's going to use that pistol, and he did, and it resulted in [F.] . . . essentially drowning in his own blood.

Dawkins contends the prosecutor's comments incorrectly informed the jurors they could find him guilty under a "reasonable foreseeability" accomplice liability standard, which Arizona courts have rejected. *See State v. Wall*, 212 Ariz. 1, ¶ 21, 126 P.3d 148, 152 (2006). We find his argument unpersuasive, however, because it fails to address § 13-303(B), which does support his culpability as an accomplice for second-degree murder as discussed above.

lock the door because "somebody was coming [and] he didn't know what they were going to do." In addition, Dawkins later told police he had paid King at least $40 to accompany him to his parents' house to supposedly "scare them," and that plan ultimately resulted in F.'s death. *See* § 13-303(B)(1) (subjecting to criminal liability one who "solicits" another person to engage in conduct causing proscribed result).

¶19 Other evidence suggested Dawkins intentionally aided or attempted to aid King "in planning or engaging in the conduct causing" the resulting death. § 13-303(B)(2). Dawkins was the one who had called the driver, Y., orchestrated the meeting with King, and instructed Y. on how to get to his parents' house. King and Dawkins then entered the backyard together and tried to unscrew or redirect the back porch light. Dawkins's mother heard him talking to F. shortly before King shot F. Contrary to Dawkins's statement to police, the mother's testimony suggested that Dawkins and King were in the room together just before King fired the gun. Additionally, shortly after the shooting, Dawkins fled with King, telling Y. to drive away with the car's headlights turned off. From this evidence, at a minimum, the jury could reasonably infer Dawkins had acted recklessly and intentionally committed one or more of the acts prescribed in § 13-303(B)(1) or (2). *See Garnica*, 209 Ariz. 96, ¶ 30, 98 P.3d at 213; *Riley*, 60 P.3d at 221; *see also Nelson*, 214 Ariz. 196, ¶¶ 14-15, 150 P.3d at 771-72.

¶20 In support of his argument, Dawkins relies heavily on the latter part of his recorded statement, in which he told police King was simply supposed to scare his parents,

not shoot or hurt them. Dawkins also points to evidence that he had a loving relationship with his parents, was visibly upset and crying after the shooting, called home to check on his family after leaving with Y. and King, and returned home shortly after the shooting.

¶21 But Dawkins's version of events was contradicted by other witnesses' testimony. For example, Dawkins told police he and King had been riding around with "some random [g]uy," or "Mexican dudes," and that King had arranged for the getaway driver who parked in the alley by Dawkins's house. But Y., the actual driver of the car, testified Dawkins had called her to pick him up and she had then driven King and him around. Dawkins's mother testified she did not know whether his crying at the house after the shooting had been genuine. And, instead of staying with his mortally wounded father or calling for help, Dawkins fled with King shortly after the shooting. *See State v. Edwards*, 136 Ariz. 177, 184, 665 P.2d 59, 66 (1983) ("[F]light . . . of an accused is a fact which may be considered by the jury as raising an inference that the accused is guilty.").

¶22 The jury is in the best position to determine the credibility of witnesses. *See State v. Cañez*, 202 Ariz. 133, ¶ 39, 42 P.3d 564, 580 (2002). In that regard, the jurors had the opportunity to not only hear Dawkins talk but also view his body language and demeanor from the DVD of his police interview. *See State v. Rutledge*, 205 Ariz. 7, ¶ 24, 66 P.3d 50, 55 (2003) (recording of witness's statement "allowed the jurors to assess [his] demeanor and credibility and helped them decide which of [his] accounts to believe"). The playing of the DVD exhibits lasted about two and a half hours, and during at least one and a half hours of

his recorded statement Dawkins had blatantly lied to police, a factor the jury properly could consider in determining his credibility. And it was only after the police suggested Dawkins had merely intended to scare his parents that he then adopted that account.

¶23 From all the evidence, a reasonable jury could find Dawkins's story unbelievable and, at a minimum, infer he had been aware of and disregarded the substantial and unjustifiable risk of bringing an armed and potentially dangerous King into his parents' bedroom, *see* §§ 13-105(9)(c), 13-1104(A)(3), and had solicited or aided King's conduct, which resulted in F.'s death.[3] *See* § 13-303(B); *Garnica*, 209 Ariz. 96, ¶ 23, 98 P.3d at 212 (recognizing accomplice liability for offenses based on reckless conduct); *see also Nelson*, 214 Ariz. 196, ¶ 12, 150 P.3d at 771 (extending *Garnica* to accomplice liability for criminal negligence). The evidence, though largely circumstantial, is sufficient to support Dawkins's conviction.[4]

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[3]Dawkins also argues insufficient evidence existed to support the lesser-included offenses of manslaughter and negligent homicide. Because we have found sufficient evidence for his second-degree murder conviction, we do not address those arguments.

[4]Because we find the evidence sufficient to support Dawkins's conviction under § 13-303(B), we do not address his reliance on *State v. Johnson*, 215 Ariz. 28, 156 P.3d 445 (App. 2007). Neither *Johnson* nor *Phillips* discussed § 13-303(B), let alone anchored their analyses and holdings on that subsection. In addition, the result in *Johnson* hinged on the defendant having been an accomplice to only one of two separate burglaries, 215 Ariz. 28, ¶¶ 17, 25, 156 P.3d at 449, 451; no such distinction applies in this case.

II. Jury instructions

A. Accomplice liability

¶24 Dawkins next contends "[t]he court committed reversible error by giving erroneous or incomplete jury instructions on accomplice liability for the lesser included offenses." Dawkins proposed a two-page jury instruction for the lesser-included offenses and accomplice liability. On the last day of trial, the parties discussed the best way to instruct the jury on those issues. Dawkins agreed to the court's proposed instructions, as long as his requested instruction was "given in its full entirety." When the court finalized the instructions, Dawkins acknowledged he had received a copy of them and did not object to changes the court had made to some of them. Dawkins thereby forfeited review for all but fundamental, prejudicial error. *See State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607 (2005); *State v. Gendron*, 168 Ariz. 153, 154, 812 P.2d 626, 627 (1991).[5]

¶25 In order to obtain relief, Dawkins first must prove error. *Henderson*, 210 Ariz. 561, ¶ 23, 115 P.3d at 608. And in assessing that issue, we review de novo whether jury instructions accurately state the law. *State v. Bocharski*, 218 Ariz. 476, ¶ 47, 189 P.3d 403,

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[5]Dawkins contends that, by requesting "the correct instruction" and later raising the inadequacy of the jury instructions in his motion for new trial, he has not waived the issue. But a defendant must object to jury instructions "before the jury retires to consider its verdict." Ariz. R. Crim. P. 21.3(c); *see also State v. Sanchez*, 165 Ariz. 164, 170, 797 P.2d 703, 709 (App. 1990). In addition, the court's accomplice liability instructions were entirely consistent with language the court previously had suggested and that Dawkins expressly agreed was "an accurate statement of the law."

414 (2008); *see also Rios*, 217 Ariz. 249, ¶ 5, 172 P.3d at 845 (review of jury instruction issue de novo when interpretation and application of accomplice liability statutes involved).

¶26 Immediately after defining all the lesser-included offenses, instructions not challenged by Dawkins on appeal, the trial court instructed the jurors on accomplice liability. In so doing, the court gave separate accomplice instructions for first-degree murder, second-degree murder, manslaughter, and negligent homicide. For example, in instructing the jury on accomplice liability for second-degree murder, the court stated:

> In order for the defendant to be liable as an accomplice for second degree murder, the defendant must have:
>
> 1) intended to aid, solicit, facilitate or command the conduct of another person that caused the victim's death and
>
> 2)
>
> A. Intended that such other person's conduct would result in the victim's death ***OR***
>
> B. Known that such other person's conduct would result in the victim's death or serious physical injury ***OR***
>
> C. Acted with extreme reckless indifference to human life as to whether the other person's conduct would result in the victim's death.

¶27 Dawkins maintains the trial court committed structural error by "giving a jury instruction that omit[ted] or misstate[d] the elements of the crime." According to Dawkins, the court's instruction improperly permitted the jury to find him guilty of second-degree murder "simply because [he] let [King] into the home knowing that he might have a gun." We are not persuaded and find no instructional error here.

¶28 The alleged structural error, Dawkins argues, arose because the portion of the trial court's accomplice liability/second-degree murder instruction that addressed "the other person's [i.e., King's] conduct" omitted the requested phrase, "showed extreme indifference to human life and created a grave risk of death." In support of that assertion, Dawkins cites *Garnica*, in which the court upheld convictions for reckless offenses based on the defendant's accomplice liability, noting that he had "intended to facilitate his brother's conduct [of shooting into a crowd] and was also, at the least, reckless about whether that conduct . . . showed 'extreme indifference to human life . . . [and] create[d] a grave risk of death.'" 209 Ariz. 96, ¶ 24, 98 P.3d at 212-13 (alterations in *Garnica*), *quoting* § 13-1104(A)(3).

¶29 *Garnica*, however, involved a broad-based challenge to *any* accomplice liability instruction for an offense "that could be established by means of a reckless mental state." 209 Ariz. 96, ¶ 10, 98 P.3d at 209. And the portion of *Garnica* on which Dawkins relies, *id*. ¶ 24, neither addresses § 13-303(B) nor reflects its requirements. As the court there ultimately concluded, when the principal's offense "require[s] only a mens rea of recklessness, a person who "has that 'kind of culpability' . . . is an accomplice if he intentionally 'aids . . . the *conduct* causing such result.'" *Garnica*, 209 Ariz. 96, ¶ 30, 98 P.3d at 214 (alteration in *Garnica*), *quoting* § 13-303(B).

¶30 As noted above, in keeping with *Garnica*, the trial court's instruction informed the jurors, inter alia, that they had to find Dawkins "[i]ntended to aid, solicit, facilitate or

command the conduct of another person that caused the victim's death and . . . [a]cted with extreme reckless indifference to human life as to whether the other person's conduct would result in the victim's death." If anything, by linking the accomplice's intentional acts to the principal's conduct rather than merely the result of that conduct, the instruction arguably benefitted Dawkins and unduly added unnecessary elements for accomplice liability for second-degree murder under § 13-303(B).

¶31 In any event, we consider the jury instructions "in their entirety to determine if they adequately reflected the law." *State v. Cordova*, 198 Ariz. 242, ¶ 11, 8 P.3d 1156, 1159 (App. 1999). Reversible error only occurs if the instructions, viewed as a whole, probably misled the jury. *See State v. Gallegos*, 178 Ariz. 1, 10, 870 P.2d 1097, 1106 (1994). Here, the court's instructions on accomplice liability did not result in any fundamental error or likely confuse or mislead the jury.

¶32 Dawkins also claims the trial court's accomplice liability instructions for manslaughter and negligent homicide were erroneous because they did not include the definition of "recklessly" or inform the jurors that "[t]he risk must be such that disregarding it is a gross deviation from what a reasonable person would do in the situation." But, as noted above, we view the jury instructions in their entirety, s*ee Cordova*, 198 Ariz. 242, ¶ 11, 8 P.3d at 1159, and the court did define those terms elsewhere in its instructions.

¶33 The trial court defined "recklessness" after instructing on all the lesser-included offenses and accomplice liability, telling the jurors "[t]he risk must be such that

disregarding it is a gross deviation from what a reasonable person would do in the situation." *See* § 13-105(9)(c). When discussing manslaughter, the court told the jurors that "[t]he definition of 'recklessly' later in the packet applies to this offense." The court also differentiated between reckless second-degree murder and manslaughter by informing the jurors that "[t]he difference is that the culpable recklessness involved in manslaughter is less than the culpable recklessness involved in second degree murder." And, the court included the "gross deviation" standard in its discussion of negligent homicide. Thus, it was unnecessary to repeat the definition of "reckless" in the accomplice liability instruction when the court included and accurately defined the term. Moreover, the instruction the court gave mirrored Dawkins's proposed instruction.

¶34 Additionally, the court instructed the jurors that they were only to consider the lesser-included offenses of manslaughter and negligent homicide if they found "the defendant not guilty of 'first degree murder,' and 'second degree murder'" or could not agree "after full and careful consideration of the facts." *See State v. LeBlanc*, 186 Ariz. 437, 438, 924 P.2d 441, 442 (1996) (approving lesser-included instructions, which contained language, "after full and careful consideration"); *see also State v. Garcia*, 538 Ariz. Adv. Rep. 13, ¶ 8 (Ct. App. Sept. 3, 2008). The verdict form reiterated that standard. "We presume jurors follow instructions." *State v. McCurdy*, 216 Ariz. 567, ¶ 17, 169 P.3d 931, 938 (App. 2007).

¶35 Even if the court erred in instructing the jury on accomplice liability for manslaughter and negligent homicide, Dawkins was not thereby prejudiced because the jury

found him guilty of second-degree murder and, therefore, did not need to consider the lesser charges. *See Henderson*, 210 Ariz. 561, ¶ 20, 115 P.3d at 607 ("[D]efendant must establish both that fundamental error exists and that the error in his case caused him prejudice."); *cf. State v. Valenzuela*, 194 Ariz. 404, ¶ 1, 984 P.2d 12, 13 (1999) (reversing second-degree murder conviction and finding fundamental error occurred when trial court failed entirely to instruct jury on reckless manslaughter as lesser-included offense supported by evidence). In sum, viewed in their entirety, the accomplice liability instructions were neither incorrect nor so misleading or confusing as to warrant reversal. *See Gallegos*, 178 Ariz. at 10, 870 P.2d at 1106.

B. *Portillo* instruction

¶36 Dawkins also contends structural error occurred when the trial court instructed the jury on reasonable doubt as mandated by our supreme court in *State v. Portillo*, 182 Ariz. 592, 596, 898 P.2d 970, 974 (1995). Our supreme court repeatedly has confirmed the validity of that instruction. *See State v. Glassel*, 211 Ariz. 33, ¶ 58, 116 P.3d 1193, 1210 (2005); *State v. Lamar*, 205 Ariz. 431, ¶ 49, 72 P.3d 831, 841 (2003). We are bound by our supreme court's rulings. *See State v. Stanley*, 217 Ariz. 253, ¶ 28, 172 P.3d 848, 854 (App. 2007). Therefore, no error occurred.

III. Voluntariness of recorded statements to police

¶37 Dawkins next argues "[t]he trial court erred in failing to suppress [his] confession" because it was involuntary and taken in violation of his constitutional rights. We

review for abuse of discretion a trial court's ruling that a juvenile defendant "voluntarily confessed." *In re Andre M.*, 207 Ariz. 482, ¶ 19, 88 P.3d 552, 556 (2004); *see also State v. Eastlack*, 180 Ariz. 243, 251, 883 P.2d 999, 1007 (1994) ("A trial court's ruling on the admissibility of a confession will not be reversed on appeal unless there has been clear and manifest error.").

¶38 Before police questioned Dawkins, an officer read him his *Miranda*[6] rights and asked, "Do you understand these rights?" Dawkins replied, "[y]es" and also responded affirmatively when asked if he was willing to talk to the police. An officer then questioned him from 4:00 a.m. until 7:06 a.m. with two breaks, one for nineteen minutes and the other for twenty-two.

¶39 Before trial, Dawkins moved to suppress his statements. After a non-evidentiary hearing on the motion, the trial court took the matter under advisement, relying on the motion papers and the written transcript of the interrogation provided by the state.[7] The court later summarily denied the motion.

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[6]*Miranda v. Arizona*, 384 U.S. 436, 444 (1966).

[7]The record is unclear as to whether the trial court watched the video recording of the interrogation before ruling or relied solely on the transcript. The state did offer to make it available, but the court stated it understood "the transcript itself [i]s the evidence." Therefore, we similarly rely on the transcript here because it does not appear the DVD was before the trial court at the hearing on the motion to suppress. *See State v. Schinzel*, 202 Ariz. 375, ¶ 12, 45 P.3d 1224, 1227 (App. 2002) (appellate court only considers "the evidence presented at the suppression hearing").

¶40 Although Dawkins replied affirmatively when asked if he wanted to waive his rights and speak to the police, he now claims his confession was involuntary. Generally, a defendant may waive his constitutional rights, which are included in the *Miranda* warnings; if he does so "voluntarily, knowingly and intelligently." *Miranda v. Arizona*, 384 U.S. 436, 444 (1966); *see also State v. Jimenez*, 165 Ariz. 444, 449, 799 P.2d 785, 790 (1990). "Confessions are presumed to be involuntary, and the State must rebut this presumption by a preponderance of the evidence." *In re Timothy C.*, 194 Ariz. 159, ¶ 13, 978 P.2d 644, 647 (App. 1998).

¶41 In determining the voluntariness of a juvenile's confession, we consider the totality of the circumstances, including his "'age, education, and intelligence; any advice to defendant of constitutional rights; the length of detention and questioning; and use of physical force.'" *Andre M.*, 207 Ariz. 482, ¶ 11, 88 P.3d at 555, *quoting Timothy C.*, 194 Ariz. 159, ¶ 16, 978 P.2d at 648; *see also Fare v. Michael C.*, 442 U.S. 707, 725 (1979); *Jimenez*, 165 Ariz. at 450, 799 P.2d at 791. Additionally, courts may consider the following factors: the presence of parents, previous exposure to *Miranda* warnings, and "the juvenile's physical and emotional health at the time of questioning, including lack of sleep or food." *Jimenez*, 165 Ariz. at 451, 799 P.2d at 792. When juveniles are involved, "courts exhibit a heightened concern with . . . voluntariness" due to their "increased susceptibility and vulnerability." *Andre M.*, 207 Ariz. 482, ¶ 9, 88 P.3d at 555.

¶42 In this case, the circumstances do not establish the trial court erred in finding the confession voluntary. *See Eastlack*, 180 Ariz. at 251, 883 P.2d at 1007. Dawkins was sixteen years old at the time and had been fully advised of his rights. He told police he understood his rights and was willing to talk to them about what had happened. He was at least familiar with *Miranda* warnings based on his previous involvement with the juvenile justice system when he was "locked up" for a month for vandalizing a desk and when he was sent to a program called "Vision Quest." And police questioned him for less than three hours, not an extraordinary length of time. Moreover, during the two breaks Dawkins apparently initiated contact with the police and spoke to officers.

¶43 Nevertheless, Dawkins maintains he had not slept in at least twenty-four hours, was not given food or drink, "was upset, scared, and tired throughout the interview" and the police "employed both overtly and subtly coercive tactics." Dawkins presented no evidence below to support those allegations; on appeal he relies solely on the transcript and DVD submitted by the state. Those items, however, do not clearly reflect any physical force, coercion, or misleading promises on the part of the police. *See Timothy C.*, 194 Ariz. 159, ¶ 17, 978 P.2d at 648; *see also State v. Huerstel*, 206 Ariz. 93, ¶ 51, 75 P.3d 698, 710 (2003) (confession may be involuntary if court finds impermissible police conduct, coercive pressures, or confession derived from previous involuntary statement).

¶44 Dawkins nevertheless claims one of the interrogating officers "misrepresented" the law when she failed to inform him he would be tried as an adult pursuant to A.R.S. § 13-

501(A)(1), which requires the state to prosecute in adult court a juvenile charged with first-degree murder. The officer stated: "There [is] the possibility that the juvenile court will waive its jurisdiction over you and you will be tried as an adult." When viewed with the totality of the circumstances, including the *Miranda* warnings that were given, we cannot say the trial court abused its discretion in implicitly finding that statement alone did not so mislead Dawkins as to overbear his will or render his confession involuntary. *See Huerstel*, 206 Ariz. 93, ¶ 54, 75 P.3d at 711.

¶45 Nor does the transcript establish that police withheld food or water from him or that they would have denied him nourishment had he asked. Moreover, the transcript reflects that Dawkins was not particularly frightened or intimidated because he repeatedly lied to the officers for an hour and a half about what had happened and about King's identity before finally changing his story. *See Huerstel*, 206 Ariz. 93, ¶ 54, 75 P.3d at 711 (juvenile maintained his innocence for fifteen minutes "despite the detectives' misrepresentations about the evidence").

¶46 Citing *Andre M.*, Dawkins argues "the State faced an even stronger presumption of involuntariness" because "no parent or trusted adult was present to assist [him]" during questioning. The court in that case found the juvenile's confession involuntary because police had not had a good reason to deny the juvenile's mother access during the interrogation. *Andre M.*, 207 Ariz. 482, ¶¶ 5, 14-15, 88 P.3d at 554, 556. Here, however, Dawkins never asked for an adult to be present, his surviving parent was not denied entry,

and Dawkins was being questioned about the shooting of his father, giving police a good reason not to ask his mother to be at the interview. Regardless, "the absence of a parent during the questioning of a juvenile does not itself render a confession involuntary, rather it is considered as a factor in the totality of the circumstances analysis." *Huerstel*, 206 Ariz. 93, ¶ 52, 75 P.3d at 711. Considering those circumstances here, we cannot say the trial court erred in ruling the state satisfied its burden of showing Dawkins's statements to police were made voluntarily. *See State v. Anderson*, 197 Ariz. 314, ¶ 35, 4 P.3d 369, 381-82 (2000); *cf. Doody v. Schriro*, 548 F.3d 847, 866-69 (9th Cir. 2008) (seventeen-year-old defendant's confession involuntary when multiple officers relentlessly interrogated him over twelve hours and defendant was fatigued, previously unfamiliar with *Miranda* rights, and largely unresponsive despite officers' insistence on his having to answer questions).

IV. Reference to undisclosed telephone call

¶47 Dawkins next contends "[t]he trial court erred in allowing the state to present evidence that was never disclosed to the defense." Before trial, Dawkins expressed concern about whether the state would introduce evidence of telephone calls he had made from jail and stated that if he did not get them soon, "I'll be asking to preclude." The prosecutor responded that he understood his "disclosure duties" and would "transcribe them, [and] give them to counsel well in advance" if he chose to use any at trial. He added that "if I hear someone at trial change[] their statement, then I may have to use it as impeachment."

¶48 During trial, the prosecutor asked Dawkins's younger brother N. about a photograph of Dawkins holding a BB gun that was posted to Dawkins's "MySpace" page on the internet. N. testified he recalled the photograph, which Dawkins had told police about during his interview. The prosecutor then asked N. if Dawkins, after his arrest, had called N. and asked him to erase the photograph. N. replied that he had deleted the whole MySpace account at his mother's request.

¶49 The prosecutor then asked N., "If there's a phone call between you and [Dawkins] that would show that, would you dispute that?" Dawkins objected on the ground that the state had failed to disclose "[e]verything that's being discussed here." Without refuting Dawkins's claim of nondisclosure, the prosecutor argued that he was using the telephone call for impeachment purposes, as he had warned he might do during the pretrial conference. The court overruled the objection. Although he did not seek to admit or refer further to the telephone call, the prosecutor then elicited testimony from N. that, after his arrest, Dawkins had given the password for his MySpace account to N., who "guess[ed]" that Dawkins had done so "because he wanted to delete the picture with the BB gun."

¶50 On appeal, Dawkins claims the prosecutor's questioning about the undisclosed telephone call violated Rule 15.1, Ariz. R. Crim. P., and the trial court should have precluded the evidence.[8] *See* Ariz. R. Crim. P. 15.7(a)(1) (court may preclude evidence as sanction for

[8]Citing *State v. Roque*, 213 Ariz. 193, ¶¶ 164-65, 141 P.3d 368, 405 (2006), Dawkins also contends the "prosecutor's failure to timely disclose evidence [was] improper." To the extent he argues on appeal that the prosecutor committed misconduct, he has not adequately

failure to disclose). We review the trial court's evidentiary ruling for an abuse of discretion. *See State v. Haight-Gyuro*, 218 Ariz. 356, ¶ 7, 186 P.3d 33, 35 (App. 2008). Even if the court abused its discretion in permitting the prosecutor to question N. about the telephone call, the error was harmless and not prejudicial. "Error . . . is harmless if we can say, beyond a reasonable doubt, that the error did not contribute to or affect the verdict." *State v. Bible*, 175 Ariz. 549, 588, 858 P.2d 1152, 1191 (1993); *see also State v. Van Adams*, 194 Ariz. 408, ¶ 23, 984 P.2d 16, 24 (1999); *State v. Coghill*, 216 Ariz. 578, ¶ 28, 169 P.3d 942, 949 (App. 2007).

¶51 Here, the only part of the telephone conversations that the state failed to disclose was Dawkins's post-arrest request to have N. delete the photograph. In his police statement, played during trial, Dawkins admitted he had photographs of himself with his BB gun on MySpace. But the ballistic report revealed that the weapon used to shoot F. was a .380 automatic pistol, not a BB gun. Dawkins admits on appeal that the telephone call was "marginally relevant" and "[a]t most, it could have reflected a fear that the photos would create a negative impression of [him]."

¶52 Nevertheless, Dawkins contends the error was not harmless because the state "emphasized" his request to delete the photograph in closing argument, and there was no

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developed this argument in his brief to show how the state's failure to disclose "permeate[d] the entire atmosphere of the trial" and denied him due process. *State v. Hughes*, 193 Ariz. 72, ¶ 26, 969 P.2d 1184, 1191 (1998). Therefore, he has waived the argument, and we decline to address it here. *See State v. Tarkington*, 218 Ariz. 369, n.1, 187 P.3d 94, 95 n.1 (App. 2008); *see also* Ariz. R. Crim. P. 31.13(c)(1)(vi).

"direct evidence that [Dawkins] intended for or knew that harm would come to his father." But as discussed above, at a minimum, a jury could have inferred his recklessness from the evidence presented, even if most of it was circumstantial. *See Pena*, 209 Ariz. 503, ¶ 7, 104 P.3d at 875. Additionally, the prosecutor did not introduce the content of the telephone call in question and did not "emphasize" the MySpace photograph. He mentioned it once in his initial closing argument, and not at all in his rebuttal. Viewed in context and considering the evidence as a whole, we find any error here harmless beyond a reasonable doubt.

V. Lack of remorse

¶53 Dawkins asks us to remand the case for resentencing because the trial "court committed fundamental error by considering . . . lack of remorse" as an aggravating factor at sentencing, violating his due process rights and privilege against self-incrimination. As the state points out, Dawkins failed to object to the court's findings at sentencing. Therefore we review for fundamental, prejudicial error. *Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d at 607; *State v. Ruggiero*, 211 Ariz. 262, n.6, 120 P.3d 690, 697 n.6 (App. 2005). We find none here.

¶54 The trial court found the following constituted aggravating circumstances: 1) presence of an accomplice; 2) the victim was his father; 3) and lack of remorse. The court also considered Dawkins's age as a mitigating factor and sentenced him to the presumptive prison term of sixteen years.

¶55 Generally, refusing to admit guilt is neither a mitigating factor nor a fact that should be held against the defendant. *See State v. Carriger*, 143 Ariz. 142, 162, 692 P.2d 991, 1011 (1984); *see also Ruggiero*, 211 Ariz. 262, n.6, 120 P.3d at 697 n.6. When a defendant does express remorse, however, the court may consider it in mitigation. *State v. Hardwick*, 183 Ariz. 649, 656, 905 P.2d 1384, 1391 (App. 1995). But a trial court's use of a defendant's decision not to admit guilt "to aggravate [his] sentence offends the Fifth Amendment privilege against self-incrimination." *Id.* Citing *Hardwick*, Dawkins contends that "[a] defendant's failure to express remorse may not be used as an aggravating factor in sentencing a defendant who maintains innocence."

¶56 In *Hardwick*, unlike here, the trial court sentenced the defendant to the maximum, aggravated prison term largely based on the defendant's "lack of contrition." *Id*. Even assuming the trial court in this case should not have relied on Dawkins's lack of remorse as an aggravating factor, as the state points out, the court's consideration of that factor was not prejudicial inasmuch as Dawkins was sentenced to the presumptive term, not an aggravated term. *See State v. Johnson*, 210 Ariz. 438, ¶¶ 10-13, 111 P.3d 1038, 1041-42 (App. 2005) (no error when court considered aggravating factor not found by jury but sentenced defendant to presumptive terms); *see also State v. Ramsey*, 211 Ariz. 529, n.7, 124 P.3d 756, 770 n.7 (App. 2005) (trial court's consideration of "lack of remorse" as aggravating factor did not warrant resentencing in view of "additional aggravating factors" court cited and presumptive sentence imposed); *cf. Ruggiero*, 211 Ariz. 262, n.6, 120 P.3d

at 697, n.6 (defendant failed to establish fundamental, prejudicial error in trial court's consideration of her "failure to accept responsibility" in aggravating sentence); *but see Pena*, 209 Ariz. 503, ¶¶ 22-26, 104 P.3d at 879 (remanding for resentencing based on trial court's consideration of improper aggravating factors even though defendant had received mitigated sentence). We find no sentencing error, fundamental or otherwise.

VI. Constitutionality of A.R.S. § 13-501

¶57 For the first time on appeal, Dawkins challenges the constitutionality of A.R.S. § 13-501 because it required the state to automatically charge and sentence him as an adult instead of allowing "'individualized consideration'" of his "'maturity and moral responsibility.'" *Stanford v. Kentucky*, 492 U.S. 361, 375 (1989). Because he did not argue this below, Dawkins forfeited all but fundamental, prejudicial error. *See Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d at 607; *see also State v. Alvarez*, 213 Ariz. 467, ¶ 7, 143 P.3d 668, 670 (App. 2006) (recognizing waiver applies to constitutional error).

¶58 Dawkins contends § 13-501 "violate[s] his right to due process and to be free from cruel and unusual punishment." Division One of this court has concluded that § 13-501 does not violate due process because "juvenile offenders do not possess rights to be adjudicated in juvenile court." *Andrews v. Willrich*, 200 Ariz. 533, ¶ 23, 29 P.3d 880, 885-86 (App. 2001).

¶59 Nevertheless, relying on *Roper v. Simmons*, 543 U.S. 551 (2005), and a psychology article discussed by the Supreme Court in that case, Dawkins claims it "is

fundamentally unfair and a violation of the Fifth, Eighth, and Fourteenth Amendments to automatically charge, try, and sentence a child as an adult for an offense allegedly committed at the age of 16," as the "automatic transfer" provision in § 13-501 did. But as the state points out, there is no constitutional right to "individualized consideration," and *Roper* supports a finding that Dawkins's sentence was constitutional.

¶60 In *Roper*, the Court held that a state could not sentence a juvenile defendant to death if he was under the age of eighteen at the time he committed the offense. *Id*. at 575. In so holding, the Court affirmed the lower court, which had set aside the juvenile's death penalty and replaced it with a life term of imprisonment, even though he was automatically tried as an adult under the Missouri statutes and had not received a prior individualized consideration of his maturity. *Id*. at 557, 560, 578-79.

¶61 Similarly, in *State v. Davolt*, 207 Ariz. 191, 84 P.3d 456 (2004), our supreme court implicitly affirmed the constitutionality of sentencing a juvenile as an adult under § 13-501. The court remanded the case to the trial court for a determination of the juvenile's "maturity and moral responsibility" before imposing the death penalty on the juvenile. *Id*. ¶¶ 108-10. But the court stated, "If the trial court finds . . . he did not possess the necessary moral responsibility and culpability to be constitutionally eligible for the death penalty, . . . the trial court must impose sentences of life or natural life." *Id*. ¶ 109.

¶62 This is not a capital case, and the trial court sentenced Dawkins to the presumptive term of sixteen years, a shorter term than life imprisonment. *Davolt* implies that

trying a juvenile as an adult without individualized consideration is constitutional, as long as the death penalty is not imposed. Dawkins has failed to establish that § 13-501 is unconstitutional or that any error occurred relating to that statute. Therefore, we do not address whether any alleged error was fundamental or caused him prejudice. *See Alvarez*, 213 Ariz. 467, ¶ 20, 143 P.3d at 674.

Disposition

¶63 Dawkins's conviction and sentence are affirmed.

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JOHN PELANDER, Chief Judge

CONCURRING:

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JOSEPH W. HOWARD, Presiding Judge

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PHILIP G. ESPINOSA, Judge